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IN THE

Supreme Court of the United States

BRISTOL-MYERS SQUIBB COMPANY,
Petitioner,

v.

SUPERIOR COURT OF CALIFORNIA FOR THE COUNTY OF SAN FRANCISCO, *et al.*,
Respondent.

On Writ of Certiorari to the California Supreme Court

BRIEF OF PHARMACEUTICAL RESEARCH AND MANUFACTURERS OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS*[1]

The Pharmaceutical Research and Manufacturers of America (PhRMA) is a voluntary, nonprofit association representing the nation's leading research-based pharmaceutical and biotechnology companies. PhRMA's mission is to advocate public policies that encourage the discovery of medicines that help patients lead longer, healthier, and more productive lives. PhRMA closely monitors legal issues that affect the pharmaceutical industry and frequently participates as amicus in cases, including by filing *amicus curiae* briefs with this Court in cases raising matters of significance to its members.

The question presented is critically important to PhRMA's members. Like the petitioner, they offer products or services nationwide and are frequently subject to claims of personal injury arising from the use of those products and services.

PhRMA's members include many pharmaceutical manufacturers that are not incorporated in California. These companies develop and sell medicines that are approved by the federal Food and Drug Administration for marketing throughout the United States and for use, as appropriate, by patients throughout the United States. Like the petitioner, these companies employ, often in each of the 50 states, representatives who are knowledgeable about

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[1] No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No one other than *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. Letters from the parties consenting to the filing of *amicus curiae* briefs have been filed with the Clerk of the Court.

their prescription products to meet with and address the questions of prescribing physicians. Like the petitioner, these companies often develop, at their headquarters, nationwide marketing plans, consistent with the standardized drug labeling that FDA has approved to accompany the medicine nationwide. Many pharmaceutical companies have facilities in states other than their home state, such as research hubs in California that may focus on a particular disease or product line other than the one at issue in a particular plaintiff's case.

Pharmaceutical companies are routinely subject to litigation involving drugs that are marketed, sold, and distributed nationwide. FDA approval to market a drug generally reflects the FDA's judgment not that use of the drug is risk-free, but that the drug's benefits "outweigh their known risks" for the population as a whole.[2] But with any prescription drug, risks remain and individual experiences will vary. Because their products are widely used and rarely risk-free, pharmaceutical companies are frequently defendants in product liability cases that involve large numbers of plaintiffs in many states who assert that they and/or their doctors were exposed to nationwide sales and marketing campaigns.

Tens of thousands of individuals have filed such claims against PhRMA members just in the past five years. Many of those claims have been filed in the California state courts by out-of-state plaintiffs

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[2] *See* FDA, *Development and Approval Process (Drugs)*, http://www.fda.gov/Drugs/DevelopmentApprovalProcess/ (last updated Jan. 29, 2016) (explaining that the FDA's drug approval process "ensures that drugs, both brand-name and generic, work correctly and that their health benefits outweigh their known risks").

alleging injuries from events that occurred outside of California. By asserting specific jurisdiction over petitioner, the California Supreme Court departed from the predominant view that bars such jurisdiction in the absence of a causal relationship between the defendant's forum contacts and the plaintiff's claims.

PhRMA has a strong interest in the uniform application of standards for personal jurisdiction that comport with fundamental principles of due process. In resolving disputes over personal jurisdiction, this Court has consistently applied the Due Process Clause to protect the values of fairness and interstate federalism. The formless standard that California's high court has endorsed, however, fundamentally rejects those values. The decision below allows the California courts to become magnets for disputes with no causal connection to events in California. Magnet jurisdictions distort the development of the law and create uncertainty and unfairness for many of PhRMA's members, including those with similar, active litigation in California. PhRMA urges the Court to hold that the "arise out of or relate to" test for specific jurisdiction requires that defendant's in-state conduct cause the plaintiff's alleged injury.

SUMMARY OF ARGUMENT

The decision below authorizes California state courts to exercise personal jurisdiction over nonresident defendants in disputes with nonresident plaintiffs that are not causally connected to alleged conduct or injury occurring in-state. For these disputes, the decision permits a California state court to serve, in effect, as a national court. Such a sweeping assertion of judicial power cannot be reconciled with either the limits that our system of

interstate federalism places on any one state court's exercise of judicial authority or the fundamental fairness in judicial proceedings that the Due Process Clause requires.

The limits on personal jurisdiction that the Due Process Clause imposes are inseparable from the limits that interstate federalism imposes on a State's ability to resolve disputes arising in other States. The Due Process Clause protects an individual's right to be subject only to a state court's lawful exercise of its judicial power. The scope of any state court's power, in turn, necessarily reflects the limitations inherent in one state court's power as compared to the power of other States. The courts of one State may not assert jurisdiction so broadly as to erode the ability of the courts of other States to serve as the expositors of their own State's laws. Such undue assertions of judicial power upset the balance of interstate federalism. A defendant therefore properly raises, under the Due Process Clause, a federalism-based concern to the scope of a state court's exercise of personal jurisdiction.

The federalism-based concerns here are substantial. This Court has long recognized, of course, that modern advances in technology, communications, and transportation minimize many of the logistical burdens that previously weighed against broad assertions of jurisdiction over nonresident defendants. But the Court also has repeatedly made clear that such advances have not erased, and could never erase, the significance of interstate boundaries for the proper operation of a federal system of coequal sovereign States. The decision below is antithetical to that system. It allows the courts of one State to become magnets of judicial authority, attracting lawsuits from around the

country involving parties and events that have no causal connection to that State. Even if a magnet court chooses to apply the laws of other States to these disputes, the inevitable reality is that the magnet State ends up arrogating to itself the primary role of determining "what the law is" for these other States. That assertion of power conflicts with the mutual respect for state sovereignty essential to interstate federalism.

The broad assertion of jurisdiction below also denies an out-of-state defendant the fundamental fairness in judicial proceedings that due process also protects. Allowing claims to proceed in the courts of a State with no causal connection to the claims can meaningfully limit a defendant's ability to fairly present its case. It is often the case in a dispute over product liability, for example, that a plaintiff's treating physician will be a key witness. Yet if the trial is held in a State where neither the plaintiffs nor their physicians reside, the defendant will be unable to subpoena these key witnesses to testify at trial, as they could if the matter were properly brought in the State in which the dispute actually arose.

The decision below stretches the "arise out of or relate to" element of specific jurisdiction farther than any decision of this Court has ever permitted. The essential distinction between general and specific jurisdiction has always been that general jurisdiction extends to cases in which there is no causal connection between the nonresident's forum contacts and the plaintiff's claim; specific jurisdiction does not. The approach below eliminates that distinction by permitting any forum contacts to suffice for specific jurisdiction in a case involving a product marketed and sold nationwide. It thus nullifies the limiting

effect of the rule, most recently set forth in *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014), that a corporation is subject to general jurisdiction only where it is essentially at home. If a state court can assert specific jurisdiction in all cases involving a nonresident manufacturer's products, regardless of where the events causing the alleged injury took place, and regardless of where the manufacturer is at home, *Daimler* will be undone. This Court should confirm that specific jurisdiction requires a causal connection between the nonresident defendant's forum contacts and the events giving rise to a nonresident plaintiff's claim.

ARGUMENT

THE COURTS OF ONE STATE MAY NOT CONSTITUTIONALLY SERVE AS NATIONAL COURTS FOR RESOLVING OUT-OF-STATE DISPUTES

Enforcement of due process limits on personal jurisdiction serves "two related, but distinguishable, functions." *World-Wide Volkswagon Corp. v. Woodson*, 444 U.S. 286, 291-92 (1980). One function is to "ensure that the States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system." *Id.* at 292. The other is to "protect[] the defendant against the burdens of litigating in a distant or inconvenient forum." *Id.* The broad approach to specific jurisdiction adopted below eviscerates both of these core functions.

In determining the scope of personal jurisdiction, moreover, this Court's longstanding approach has been to separately evaluate the grounds for general jurisdiction and for specific jurisdiction. The

distinction between these two grounds for personal jurisdiction has turned on the presence or absence of a causal connection between the claims at issue and the defendant's forum contacts. Where a sufficient causal connection exists, the analysis has been one of specific jurisdiction. In the absence of a causal connection, the Court has evaluated the criteria for establishing general jurisdiction. By dispensing with any causation requirement for establishing specific jurisdiction, the decision below effectively destroys this Court's longstanding analytical framework for evaluating personal jurisdiction and creates an all-purpose general jurisdiction based on contacts insufficient to satisfy the Court's "at home" requirements.

A. Due Process Limitations On Personal Jurisdiction Necessarily Reflect Considerations Of Interstate Federalism.

Principles of interstate federalism and due process are inextricably intertwined. A defendant has the right, under the Due Process Clause, to be subject only to a state court's lawful exercise of judicial power. Whether any such exercise of judicial power is lawful, however, depends in significant part on whether the state court has authority, consistent with the constraints of federalism, to render its judgment.

The scope of any State's sovereign power is limited by the scope that the Constitution reserves to other States in the federal system. For example, if each State, pursuant to the Full Faith and Credit Clause, Article IV Section 1, is to respect the judgments and "judicial Proceedings" of other States, then no single State may intrude unduly on the judicial authority of other States. Similarly, the Supremacy Clause of Article VI affords to the Federal Government, but not

any one State, the right to supersede another State's laws. And the Tenth Amendment reserves rights to each State "respectively" rather than to the States collectively. Under the Constitution, therefore each State may exercise its sovereign authority only to the extent it does not infringe the authority of its "coequal sovereigns in a federal system." *World-Wide Volkswagen*, 444 U.S. at 292. The Court's personal jurisdiction decisions have long recognized this fundamental limitation on state judicial power.

1. In *International Shoe*, the Court held that a state court had personal jurisdiction over a Delaware corporation, which employed sales personnel in and shipped orders to the forum state, for a suit to collect taxes owed to the state's unemployment compensation fund. *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 311-14, 320 (1945). The decision established the principle that a state court may assert jurisdiction in a case arising out of a nonresident defendant's activities within the territorial borders that State. It was fair within a federal system for a state court "to enforce the obligations which [the nonresident defendant] ha[d] incurred" in that State. *Id.* at 321.

International Shoe was a "momentous departure" from the "rigidly territorial focus" that had previously guided the Court's decisions. *Daimler*, 134 S. Ct. at 755; see *Pennoyer v. Neff*, 95 U.S. 714, 722 (1878) ("The several States are of equal dignity and authority, and the independence of one implies the exclusion of power from all others."). Nothing in *International Shoe* suggested, however, that one state court could enforce obligations that a nonresident defendant had incurred in a different state. Far from rejecting all limitations on state sovereignty, the Court arrived at the "minimum contacts" test by considering how "the demands of due process," could

be met "in the context of our federal system of government." 326 U.S. at 317.

This Court's subsequent decisions in *McGee* and *Hanson* confirmed that technological advances did not eliminate all consideration of interstate federalism as a limitation on personal jurisdiction. *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220 (1957); *Hanson v. Denckla*, 357 U.S. 235 (1958). In *McGee*, the Court held that a California state court properly exercised jurisdiction over a Texas insurance company that mailed a life insurance policy offer to a California resident who then purchased the policy and paid premiums from California. 355 U.S. at 221-23. The suit, in which the policy beneficiary attempted to recover on the policy the company refused to pay, was "based on" these contract-related contacts with California. *Id.* at 223. The decision noted that advances in the national economy, transportation, and communication had spurred a "trend" of expanding personal jurisdiction over nonresidents. *Id.* at 222-23. But technological progress has made it only "less burdensome" for a nonresident to litigate in a distant forum (*id.*); it did not eliminate all interstate federalism concerns.

If any doubt persisted after *McGee* about the continuing relevance of state territorial limits to personal jurisdiction, the decision the following year in *Hanson* eliminated it. *Hanson* involved the heirs of a decedent who had executed a trust in Delaware and appointed a Delaware entity as the trustee while she was living in Pennsylvania. 357 U.S. at 238. Although the decedent died in Florida, the Court held that the Florida court lacked jurisdiction over the Delaware trustee because the cause of action did not "arise out of an act done or transaction consummated" in Florida. *Id.* at 251-55. In so holding, the

Court confirmed that *International Shoe*'s "flexible standard" did not "herald[] the eventual demise of all restrictions on the personal jurisdiction of state courts." *Id.* at 251. As the Court explained, "[t]hose restrictions are more than a guarantee of immunity from inconvenient or distant litigation" because "[t]hey are a consequence of territorial limitations on the power of the respective States." *Id.*

World-Wide Volkswagen provided further confirmation that territorial borders still impose important constraints upon the jurisdiction of a sovereign State's courts. There, the Court held that an Oklahoma court lacked jurisdiction over an automobile distributor and a retail dealer—both incorporated and operating primarily in New York—in a claim involving a car accident in Oklahoma. The Court acknowledged that the economic trends described in *McGee* had "only accelerated." *World-Wide Volkswagen*, 444 U.S. at 293. But to "remain faithful to the principles of interstate federalism embodied in the Constitution," modern advances could not render "state lines . . . irrelevant for jurisdictional purposes." *Id.* Preventing the erosion of interstate federalism was still fundamental to personal jurisdiction because

> [T]he Framers also intended that the States retain many essential attributes of sovereignty, including, in particular, the sovereign power to try causes in their courts. The sovereignty of each State, in turn, implied a limitation on the sovereignty of all of its sister States—a limitation express or implicit in both the original scheme of the Constitution and the Fourteenth Amendment.

Id. Thus, the majority in *World-Wide Volkswagen* focused on the "defendant's conduct and connection

with the forum State," *id.* at 297, and rejected a test rooted in the contacts of the disputed product, which could cross state lines, see *id.* at 318-19 (Blackmun, J., dissenting).

Sovereignty-based limits on personal jurisdiction were also important to the plurality decision in *Nicastro*. There, the Court held that a New Jersey court lacked jurisdiction over a British manufacturer of a machine alleged to have injured a metal worker in New Jersey. *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 887 (2011) (plurality). The manufacturer did not market in or sell goods to New Jersey, but the machine ended up in New Jersey through a U.S. distributor. *Id.* at 878. The plurality confirmed the role of sovereign authority in the personal jurisdiction analysis, *id.* at 882, explaining that "due process protects the individual's right to be subject only to lawful power. But whether a judicial judgment is lawful depends on whether the sovereign has authority to render it." *Id.* at 884 (citation omitted).

Finally, in *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011), the Court observed that specific jurisdiction requires "an affiliation between the forum and the underlying controversy, principally, activity or an occurrence that takes place in the forum State and is therefore subject to the State's regulation." *Id.* (internal citation and alteration omitted). Although the focus of *Goodyear* was on general jurisdiction, the Court approved the North Carolina court's conclusion that it lacked specific jurisdiction because the bus accident at issue occurred in France and the tire which allegedly caused the accident was manufactured in Turkey. In so holding, *Goodyear* confirmed the principle that a state court may assert jurisdiction

based on a nonresident defendant's activities that "take[] place" within the forum's territorial boundaries because those activities are properly subject to the "State's regulation." *Id.* That is the same principle that *International Shoe* recognized more than 70 years ago when it considered how "the demands of due process" could be met "in the context of our federal system of government." *Int'l Shoe*, 326 U.S. at 317.

2. Some of this Court's opinions have emphasized that the "ultimat[e]" focus of the Court's inquiry into personal jurisdiction is the scope of a defendant's liberty interest under the Due Process Clause, rather than state sovereignty. See *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 n.13 (1985); *Ins. Corp. of Ir., Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 & n.10 (1982); *Shaffer v. Heitner*, 433 U.S. 186, 204 & n.20 (1977).

Fairly read, however, both in isolation and in the broader sweep of this Court's decisions, these cases neither hold nor counsel that interstate federalism may be disregarded in the personal jurisdiction analysis. Rather, the concepts of federalism and the defendant's liberty interest are mutually reinforcing. It would infringe a defendant's liberty interest under the Due Process Clause, for example, to be subjected to a state court judgment that was beyond the authority of a state court to issue. In assessing a defendant's rights under the Due Process Clause, therefore, a court may appropriately determine whether it would be acting in excess of its authority to assert jurisdiction over a nonresident defendant—including its authority as measured relative to the authority of other States. *World-Wide Volkswagen*, 444 U.S. at 294. No other approach could be consistent with interstate federalism, because, as

Shaffer acknowledged, States "are defined by their geographical territory." *Shaffer*, 433 U.S. at 204 n.20. Thus, "restrictions on the personal jurisdiction of state courts" ultimately "are a consequence of territorial limitations on the power of the respective states." *Hansen*, 357 U.S. at 251; see *Ins. Corp. of Ir.*, 456 U.S. at 702 n.10 (acknowledging that "the requirements of personal jurisdiction, as applied to state courts, reflect an element of federalism and the character of state sovereignty vis-à-vis other States"); *Burger King*, 471 U.S. at 473 n.13 (stating that personal jurisdiction limits "operate[] to restrict state power"); see also A. Benjamin Spencer, *Jurisdiction to Adjudicate: A Revised Analysis*, 73 U. Chi. L. Rev. 617, 637-42 (2006).

That a defendant may waive its objection to jurisdiction in a particular case does not undermine the importance of federalism in limiting a state court's exercise of judicial power. In *Insurance Corporation of Ireland*, the Court noted that a limitation on sovereign power cannot be waived. See *id.* at 456 U.S. at 702 n.10 ("[i]ndividual actions cannot change the powers of sovereignty"). One defendant's waiver of personal jurisdiction, however, does not alter a sovereign's power. Precisely because a defendant's protection is rooted in the Due Process Clause, a defendant's waiver means only that the defendant is waiving a personal due process right. See Spencer, *supra*, at 639-40. One defendant's waiver of its own due process rights cannot deprive another defendant of its right to challenge the same state court's authority relative to the sovereignty of other States. Respect for the values of interstate federalism thus underlie and help define the scope of the individual liberty interest.

3. The disruption to interstate federalism that the decision below approves is substantial. Thousands of nonresident plaintiffs already have claims pending in California courts against nonresident pharmaceutical manufacturers, and if the Court affirms the decision below, thousands more such claims inevitably will follow. Product liability cases are legion, and the core facts cited to support specific jurisdiction in the decision below are found in many other product liability cases involving other pharmaceutical companies.

For example, the majority concluded that "BMS's nationwide marketing, promotion, and distribution of Plavix" created the "substantial nexus" between the nonresident plaintiffs' claims and BMS's contacts with California. Pet. App. at 28a. PhRMA's members engage often in some form of nationwide marketing, promotion, and distribution of their drugs. The majority also cited BMS's "other activities" in California, such as the maintenance of research and development facilities unrelated to the development of the drug at issue, Plavix. *Id.* at 5a-6a, 32a. Many of PhRMA's members have facilities in California that conduct activities unconnected to events that out-of-state plaintiffs allege cause their injuries. Because the same facts that supported specific jurisdiction in petitioner's case will be present in many cases involving PhRMA's members, the rule applied below permits California courts to function as the national courts for pharmaceutical products litigation that properly belongs in the jurisdiction in which the alleged events at issue occurred, not California.

The instant case is but one example among many in which California courts are entertaining claims that collectively involve thousands of out-of-state plaintiffs against nonresident pharmaceutical companies. A

recent study of more than 2,900 cases filed against pharmaceutical companies in Los Angeles and San Francisco counties between January 2010 and May 2016, showed that these complaints combined the claims of over 25,000 individual plaintiffs, and that only 10.1% of these individuals were California residents.[3] The remaining 89.9%—over 20,000 individual claimants—were residents of another state.[4] California state courts are thus effectively acting as national courts in pharmaceutical product litigation not just for the many out-of-state plaintiffs who have sued BMS in cases involving Plavix, but for thousands of claims by other out-of-state plaintiffs against other out-of-state manufacturers in cases involving a variety of other pharmaceutical products. This assertion of judicial power intrudes on the sovereign authority of other States to create and enforce their own laws. See *Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel. Barez*, 458 U.S. 592, 607 (1982); *Shaffer*, 433 U.S. at 225 (A court that "appl[ies] the law of a different forum" is "less interested in fostering the policies of that foreign jurisdiction, than would the courts established by the State that provides the applicable law.") (Brennan, J., concurring).

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[3] Ryan Tacher, Civil Justice Ass'n of Cal., *Out-of-State Plaintiffs: Are Out-of-State Plaintiffs Clogging California Courts?* 2 (2016), http://cjac.org/what/research/CJAC_Out_of_State_Plaintiffs_Exec_Summary.pdf.

[4] *Id.*

B. Allowing One State's Courts To Serve As National Courts In Products Liability Cases Undermines The Fair And Orderly Administration Of The Laws.

The decision below disrupts the "fair and orderly administration of the laws" that the Due Process Clause also serves to ensure. *Int'l Shoe*, 326 U.S. at 319.

For corporations with operations across state lines, fairness requires that courts heed the "essential difference between case-specific and all-purpose (general) jurisdiction." *Goodyear*, 564 U.S. at 927. Where a corporation is "essentially at home," it is fair for the courts to assert personal jurisdiction over the corporation in any lawsuit. *Id.* at 919. Elsewhere, however, the assertion of personal jurisdiction depends on "an affiliation between the forum and the underlying controversy." *Id.* (alteration omitted). And "even regularly occurring sales of a product in a State do not justify the exercise of jurisdiction over a claim unrelated to *those sales*." *Id.* at 931 n.6 (emphasis added). The distinction between general and specific jurisdiction thus provides "minimum assurance" to corporations with sales in all 50 states about where they will be liable to suit. *World-Wide Volkswagen*, 444 U.S. at 297. By effectively eliminating that distinction, however, the decision below renders the exercise of personal jurisdiction wholly uncertain and unpredictable.

The decision below compounds uncertainty about jurisdiction for companies that market their products nationwide, and particularly for pharmaceutical companies. *Daimler* acknowledged that predictability is an important aspect of due process; even corporations with nationwide sales are entitled to some "minimum assurance[s]" about where their

conduct will render them liable to suit. *Daimler*, 134 S. Ct. at 760-62; see also *Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2010) ("Predictability is valuable to corporations making business and investment decisions."). *Daimler* provided those minimum assurances by confirming that a corporation is subject to general jurisdiction where it is essentially at home, typically in the States where the corporation is incorporated or has a principal place of business. *Daimler*, 134 S. Ct. at 760-61. The Court explained that these "affiliations have the virtue of being unique—that is, each ordinarily indicates only one place—as well as easily ascertainable." *Id.* at 760 (citing *Hertz Corp.*, 559 U.S. at 94 ("Simple jurisdictional rules . . . promote greater predictability."). But in state courts with expansive views of how to apply the "arise out of or relate to" standard for personal jurisdiction, *Daimler*'s limits on general jurisdiction are simply mooted for companies with nationwide sales and marketing. As the dissent observed, an expansive view of specific jurisdiction "subject[s] companies to the jurisdiction of California courts to an extent unpredictable from their business activities in California." Pet. App. at 50a (Werdegar, J., dissenting).

If the Court were to accept Respondents' view, then every State with a long-arm statute that extends to the limits of Due Process would be free to apply California's standard. The problems the dissent identified below may then expand beyond a few state courts with expansive views, and could create pervasive conflicts nationwide, because many States permit their courts to exercise specific jurisdiction up to the constitutional limits.

It is no answer to say that all national sellers can predict that they will be sued in every court in the

land, because there is no predictable relationship between the distribution of a company's product across the 50 states and the company's product liability cases. See Pet. App. at 79a (Werdegar, J., dissenting). Nor can companies predict which courts will become magnet jurisdictions and how disproportionate their impact on product liability law may become.

For example, pharmaceutical companies have faced thousands of personal injury claims in the City of St. Louis, another magnet jurisdiction with state courts that have expansively construed personal jurisdiction. None of the defendants in those cases is "at home" in Missouri, and the vast majority of the claims against them have been brought by out-of-state residents. See, *e.g.*, *Lovett v. Pfizer Inc.*, No. 1422-CC00225-01 (St. Louis Cir. Ct. Mar. 27, 2014) (three in-state plaintiffs and 88 out-of-state); *Anthony v. Bayer Corp.*, No. 1622-CC09415 (St. Louis Cir. Ct. June 10, 2016) (nine in-state plaintiffs and 86 out-of-state); *Hogans v. Johnson & Johnson*, No. 1422-CC09012-01 (St. Louis Cir. Ct. Sept. 29, 2014) (two in-state plaintiffs and 63 out-of-state).[5]

Relying upon *Daimler*, the Missouri Supreme Court just issued a decision that could foreclose further use of the Missouri state courts as a magnet for out-of-

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[5] Plaintiffs flocked to the City of St. Louis because of its reputation for denying motions to dismiss, providing little gatekeeping on expert testimony or other evidentiary restrictions, affording a jury pool friendly to plaintiffs, and upholding outsized verdicts; of the top six product defect verdicts in the United States in 2016, half came out of the St. Louis court. *See* Margaret Cronin Fisk, *Welcome to St. Louis, the Hot Spot for Litigation Tourists*, BloombergBusinessweek (Sept. 29, 2016), https://www.bloomberg.com/news/articles/2016-09-29/plaintiffs-lawyers-st-louis.

state disputes. In *State ex rel. Norfolk Southern Railway v. Dolan*, No. SC95514, 2017 WL 770977 (Mo. Feb. 28, 2017) (en banc), the court held that a St. Louis County court lacked jurisdiction over a Virginia railway company that operates tracks in Missouri because the Indiana plaintiff's personal injury claims related to his work in Indiana, and hence did not "arise out of" the defendant's activities in Missouri. *Id.* at *1. In so holding, the court rejected the argument, functionally identical to that accepted below, that a state court could assert jurisdiction over a "national company" because the company does the "same 'type' of business in the forum state as in the rest of the country." *Id.* at *6. "Such an argument goes even further than the pre-*Daimler* approach to *general* jurisdiction . . . . turn[ing] specific jurisdiction on its head." *Id.* The Missouri Supreme Court's analysis is persuasive, and further illustrates how far the decision below has strayed from settled understandings of the scope of personal jurisdiction.

By filing suit in a State with no causal connection to the plaintiff's injury, a plaintiff can effectively limit a pharmaceutical company's ability to put on a full and fair defense. In many pharmaceutical product liability cases, for example, the outcome can turn on the availability of testimony from an independent witness – the plaintiff's prescribing physician. The prescribing physician can testify authoritatively as to the information she had about the risks and benefits of the drug and how she weighed those risks and benefits before deciding to prescribe the drug to the plaintiff. Such testimony is, as a matter of state law, often critical to the assessment of liability. See, *e.g.*, *Carlin v. Superior Court*, 13 Cal. 4th 1104, 1116 (1996) ("[I]n the case of prescription drugs, the duty to warn runs *to the physician*, not to the patient.");

Valentine v. Baxter Healthcare Corp., 68 Cal. App. 4th 1467, 1483 (1999) ("In the case of prescription drugs . . . it is through the physician that a patient learns of the properties and proper use of the drug . . . ."). And because juries typically do not view physicians as aligned with either of the parties, a physician's testimony is often critical to the jury's resolution of the merits. The testimony of the plaintiff's prescribing physician thus often plays a central role in a pharmaceutical company's defense of product liability cases.

State courts are limited, however, in their power to compel out-of-state witnesses to appear at trial. A California court, for example, has no power to compel nonparty witnesses from other states to appear at trial in California. See Cal. Code Civ. Proc. § 1989. Such limitations are common and reflect longstanding limits on the judicial power of state sovereigns that modern minimum contacts analysis does not overcome for nonparty witnesses, such as physicians, in civil trials. See, *e.g.*, *Colo. Mills, LLC v. SunOpta Grains & Foods Inc.*, 269 P.3d 731, 733 (Colo. 2012) (holding that "as a matter of state sovereignty," Colorado courts "have no authority to enforce civil subpoenas against out-of-state nonparties"); Marc Fuller, *Jurisdictional Issues in Anonymous Speech Cases*, 31 Comm. Law. 24, 26 (2015) ("[S]ubpoena power is governed by the 'strict territorial approach' of *Pennoyer v. Neff*."). While the defense can play videotaped excerpts of a discovery deposition of an out-of-state witness, the inability to tailor the trial examination to the key issues brought forth at the trial itself is a severe limitation on an effective defense. Not being able to compel the presence of a key witness at trial is plainly one of the "burdens of litigating in a distant or inconvenient

forum," *World-Wide Volkswagen*, 444 U.S. at 292, and one that the decision below imposes en masse without regard to its negative impact on the fundamental fairness of the trial of product liability cases.

State court overreaching also diminishes the role of the federal courts in hearing cases of national significance. As Congress acknowledged in the Class Action Fairness Act ("CAFA"), the "intent of the framers" was that federal courts would hear "interstate cases of national importance." Pub. L. No. 109-2, § 2(b)(2), 119 Stat. 4, 5 (2005) (codified at 28 U.S.C. § 1711 (note)). A federal forum is important for defendants because state and local courts sometimes engage in "[a]buses," including "keeping cases of national importance out of Federal court," "acting in ways that demonstrate bias against out-of-State defendants;" and "making judgments that impose their view of the law on other States and bind the rights of the residents of those States." *Id.* § 2(a)(4), 119 Stat. at 5.

Congress intended CAFA to address these issues in part by allowing defendants to remove mass actions to federal court under a variety of circumstances. *Id.* § 5(a), 119 Stat. at 12-13 (codified at 28 U.S.C. § 1453(b)). Out-of-state plaintiffs often evade CAFA, however, by filing a series of otherwise identical complaints that each names fewer than 100 plaintiffs. For example, the hundreds of plaintiffs in the Plavix matters in California were spread across eight complaints to avoid triggering the "mass action" provisions of CAFA.[6]

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[6] *See, Caoutte v. Bristol-Myers Squibb Co.*, No. 12-1814, slip op. at 10-13 (N.D. Cal. Aug. 10, 2012) (Order Granting Plaintiffs' Motion To Remand) (ECF No. 56).

Similarly, such plaintiffs attempt to defeat removal jurisdiction by naming an in-state entity, such as a distributor, as a defendant even in situations where there is no actual connection between the in-state entity and the out-of-state plaintiffs. See Pet. App. at 59a (Werdegar, J., dissenting) (describing the majority's reference to McKesson as "perhaps the ruddiest" of all "the majority's red herrings" because "at no point have real parties argued McKesson bore any responsibility in providing them Plavix.").[7]

Even when defendants expose such jurisdictional gerrymandering as improper, litigating the issues wastes resources and disrupts the orderly administration of the law.[8] When jurisdictional rules permit courts to find jurisdiction based on a nonresident defendant's relationship with an in-state entity whose conduct is itself unrelated to the suit, it defeats diversity's jurisdiction's basic rationale of "opening the federal court doors to those who might otherwise suffer from local prejudice." *Hertz*, 559 U.S. at 85. Indeed, predictable jurisdictional rules are critical to avoid otherwise wasteful litigation over the threshold question of *where* a case may properly be litigated. The formless test applied below exemplifies the problem that unclear jurisdictional rules create and endorses a form of jurisdictional piggybacking

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[7] Docket searches indicate that McKesson has been named as a defendant in 795 of the 1,499 products liability cases filed against pharmaceutical companies in Los Angeles County in the past five years.

[8] *See, e.g., In re Avandia Mktg., Sales Practices & Prods. Liab. Litig.*, 2014 U.S. Dist. LEXIS 67675, at *11 (E.D. Pa. May 15, 2014) (concluding six years after the issue was first raised that the case was "mature enough" to determine that McKesson was misjoined).

that distorts our federal system and the jurisdictional rules Congress has established.

C. The Court Should Reject Any Test For Specific Jurisdiction That Does Not Require A Causal Connection Between The Defendant's Conduct In The Forum State And The Plaintiff's Claim.

The assertion of specific jurisdiction should rest, at a minimum, upon a causal connection between the defendant's conduct in the forum state and the plaintiff's claim. The need for such a requirement is inherent in the distinction this Court has drawn between general and specific jurisdiction.

In *Daimler,* this Court placed meaningful constraints on the scope of general jurisdiction by limiting the exercise of such jurisdiction to the State or States in which a corporation is "at home." 134 S. Ct. at 751, 760-62. The premise of *Daimler* is that, where there is no causal connection between the defendant's conduct in the forum state and the plaintiff's claims, the assertion of personal jurisdiction may be grounded only upon the defendant's more general conduct that rendered it at home in the forum state. *Daimler* provides a measure of predictability to corporations because it focuses on corporate "affiliations [that] have the virtue of being unique—that is, each ordinarily indicates only one place." *Id.* at 760. This limitation provides the "minimum assurances" to corporations as to where conduct will and will not render them liable to suit that the Due Process Clause requires. *Id.* at 762.

Under the decision below, however, the limitations on general jurisdiction effectively serve no purpose at all. By refusing to limit specific jurisdiction to cases involving a causal connection between the defen-

dant's conduct in the forum and the plaintiff's claims, the decision below expands specific jurisdiction to cover the very types of disputes over which the Court made clear in *Daimler* were off limits to state courts under the rubric of general jurisdiction.

The Court's decisions involving specific jurisdiction reflect the premise that a causal connection is a prerequisite for the exercise of specific jurisdiction. As the dissent below recognized, "[o]f the post-*International Shoe* decisions in which the high court actually found a factual basis for specific jurisdiction, each featured a direct link between forum activities and the litigation." Pet. App. 53a-54a (Werdegar, J., dissenting). See *Int'l Shoe*, 326 U.S. at 311-14, 320 (nonresident defendant's employment of salespeople in the forum and systematic fulfillment of orders solicited by those salespeople were causally connected to claim of unpaid employment taxes in that forum); *McGee*, 355 U.S. at 221-23 (nonresident defendant's mailing of life insurance policy to the forum and receipt of payments from the forum were causally connected to a claim for recovery under the policy); *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 772, 776-77, 780 (1984) (nonresident defendant's sale of magazine in the forum was causally connected to plaintiff's claim of libel including harm to her reputation in New Hampshire); *Calder v. Jones*, 465 U.S. 783, 785-86, 788-89 (1984) (nonresident defendants' publication of an article, including visits and calls to the forum and reliance on sources from the forum, was causally connected to the plaintiff's libel claim); *Burger King*, 471 U.S. at 479-81 (nonresident defendants' negotiations and formation of a franchise agreement with a franchisor in the forum, sending of payments to the forum under the agreement, purchase of equipment in the forum, and

acceptance of regulations from the franchisor in the forum were causally connected to a claim for breach of the franchise agreement).

The phrase "arise out of or relates to" thus has been applied as a test that requires causation, and that distinguishes specific jurisdiction from general jurisdiction. Any more elastic interpretation, resting on the potentially infinite capacity to draw relationships between acts, eliminates any meaningful limitation on the scope of personal jurisdiction. As Justices Scalia and Ginsburg observed in another context, applying a rule based on the phrase "relates to" is a "project doomed to failure, since, as many a curbstone philosopher has observed, everything is related to everything else." *Cal. Div. of Labor Standards Enf't v. Dillingham Constr., N.A., Inc.*, 519 U.S. 316, 335 (1997) (Scalia, J., concurring). For this reason as well, the Court should hold that specific jurisdiction requires a causal connection between the defendant's in-forum conduct and the plaintiff's claims.

Finally, a causal connection for specific jurisdiction is essential to provide predictability and proportionality for companies that sell their products nationwide. They could anticipate, for example, that the volume of product litigation in any state where they are not at home would be proportional to their sales in that state. Similarly, they would know that the use of a California-based distributor whose conduct is causally unrelated to product-liability claims would not permit a California court to assert personal jurisdiction over the manufacturer. See *Rush v. Savchuk*, 444 U.S. 320, 331-32 (1980) ("The assertion of jurisdiction over [one defendant] based solely on the activities [another defendant] . . . . is plainly unconstitutional."). Without a causation

requirement, nonresident defendants are at risk of being subject to personal jurisdiction whenever they have an in-state distributor, which is "an outcome that would sweep beyond even the sprawling view of general jurisdiction . . . rejected in *Goodyear*." *Daimler*, 134 S. Ct. at 760.

CONCLUSION

For the foregoing reasons and those stated by Petitioner, the judgment of the California Supreme Court should be reversed.

Respectfully submitted,

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